No. 154.

MAR 2 1898
JAMES H. McKENNEY,
CLERK

Record Brf. of Atty. General (Petitioner) for U. S.

Filed Mar. 2, 1898.

In the Supreme Court of the United States.

OCTOBER TERM, 1897.

QUINCY A. SHAW, PLAINTIFF IN ERROR,
v.
MURRAY M. KELLOGG.
} No. 154.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

REVISED BRIEF ON BEHALF OF THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1897.

QUINCY A. SHAW, PLAINTIFF IN ERROR, v. MURRAY M. KELLOGG. No. 154.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

REVISED BRIEF ON BEHALF OF THE UNITED STATES.

STATEMENT.

This is an action in ejectment, instituted in the circuit court for the district of Colorado by the plaintiff in error against the defendant in error.

The declaration alleges title to a tract of land $12\frac{1}{2}$ miles square in Saguache County, Colo., "*including certain mineral-bearing property designated by the defendant*

as the Eastern Star Mine, with other mining lands adjacent thereto," and alleges, among other things, that plaintiff's title is based upon an act of Congress approved June 21, 1860, entitled "An act to confirm certain private-land claims in the Territory of New Mexico," and that under said act of Congress the heirs of Baca selected and located the lands thereinbefore described, including the premises in controversy, and that the location of the same was approved by the proper officers of the Land Department of the United States, and that said land was, by the surveyor-general of Colorado, thereunto duly authorized, certified to be nonmineral land; "and the plaintiff claims that, by virtue of said statute and the finding of said surveyor-general as to the nonmineral character of said land at the time of its selection and location, the title to all of said premises passed to the heirs of Luis Maria Baca, * * * notwithstanding the fact of subsequent discoveries of precious metals within the boundaries of the said Baca grant No. 4, hereinabove described."

The answer put in issue the title of plaintiffs and the fact of the approval by the proper officers of the United States of the location of the lands in controversy, and alleged, as a separate defense, that on the 24th day of April, 1876, the land in dispute was unappropriated public mineral land, and that on said day it was explored and located as mineral land under the laws of the United States.

The plaintiff, to sustain the issues on his part, introduced the following evidence of title:

(*a*) SECTION 6 OF ACT OF CONGRESS APPROVED JUNE 21, 1860, ENTITLED "AN ACT TO CONFIRM CERTAIN PRIVATE LAND CLAIMS IN THE TERRITORY OF NEW MEXICO," which is as follows (R., 27):

> SEC. 6. *And be it further enacted*, That it shall be lawful for the heirs of Luis Maria Baca, who make claim to the said tract of land as claimed by the town of Las Vegas, to select, instead of the land claimed by them, an equal quantity of vacant land, *not mineral*, in the Territory of New Mexico, to be located by them in square bodies not exceeding five in number. And it shall be the duty of the surveyor-general of New Mexico to make survey and location of the lands so selected by said heirs of Baca when thereunto required by them: *Provided, however*, That the right hereby granted to said heirs of Baca shall continue in force during three years from the passage of this act, and no longer.

(*b*) CONTRACT FOR DEED. JOHN S. WATTS TO WILLIAM GILPIN, DATED FEBRUARY 17, 1862. (R., 60.)

This IS AN AGREEMENT of sale and transfer of "one of said five grants or claims of land, estimated to contain 100,000 acres," under the act above cited.

(*c*) SELECTION OF WATTS AS ATTORNEY FOR THE BACA HEIRS, DECEMBER 12, 1862. (R., 31–33.)

The application to select this land was dated December 12, 1862, and was filed in the office of the surveyor-general of New Mexico on February 5, 1863, and was by the surveyor-general of New Mexico, forwarded to the surveyor-general of Colorado, which Territory had

in the meantime been created, and within the boundaries of which this land lay. On the last-named day the surveyor-general of Colorado transmitted this application to the Commissioner of the General Land Office, and his official letter of transmission concludes as follows:

> I suppose this selection has been made by ex-Governor Gilpin, as he told me last summer he was in possession of one of the Baca floats and should locate it as this is located, for the reason that in his opinion it would cover rich minerals in the mountains.

(*d*) OFFICIAL LETTER, COMMISSIONER OF THE GENERAL LAND OFFICE TO SURVEYOR-GENERAL OF COLORADO, MARCH 13, 1863. (R., 33–34.)

By this letter the Commissioner acknowledges receipt of the letter of the surveyor-general of February 24, 1863, which inclosed the application of Watts, as attorney for the Baca heirs, to select this land, and in this letter the Commissioner says:

> It is necessary, before the application can be approved by this office, that it be accompanied by the certificates of the surveyor-general and the register and receiver that the land so selected as vacant and nonmineral; * * * especially should the character of the location as to minerals be *carefully ascertained* after the important statement of ex-Governor Gilpin, which you communicated in your official letter to this office.

(*e*) THE SURVEYOR-GENERAL OF COLORADO, OCTOBER 13, 1863, REPORTS APPLICATION OF GILPIN FOR SURVEY. (R., 34.)

In this letter the surveyor-general informs the Commissioner of the General Land Office that on October 5,

Gilpin, as representative of the heirs of Baca, filed in his office an application for the survey of Baca float No. 4, and that he wished an immediate survey made; and the surveyor-general further reports that he replied to Governor Gilpin, that he was forbidden by his instructions to make a survey of any grant situate more than 6 miles from existing lines of public surveys, and that it would be some time before the lines of survey would reach the location of this grant, and that he would order a survey and make a contract subject to the approval of the Commissioner; that Mr. Gilpin had deposited the money for the survey with the understanding that if the contract was not approved the money was to remain in the hands of the surveyor-general until the survey was finished, then to be paid to the deputy for work done, "*the survey being considered private and not official.*"

(*f*) DISAPPROVAL OF CONTRACT FOR SURVEY, NOVEMBER 2, 1863. (R., 35.)

In this letter the Commissioner uses the following language: "In your letter transmitting the application of the attorney for said heirs for the location of this claim you say, 'I suppose this selection has been made by ex-Governor Gilpin, as he told me last summer he was in possession of one of the Baca floats and should locate it as this is located, for the reason that in his opinion it would cover rich minerals in the mountains.'" And the Commissioner then proceeds to reiterate his instructions, calling especial attention to those relating to the mineral or nonmineral character of the land.

(*g*) LETTER OF SURVEYOR-GENERAL TO COMMISSIONER OF THE GENERAL LAND OFFICE, DECEMBER 12, 1863, TRANSMITTING CERTIFICATE OF NONMINERAL CHARACTER OF LAND. (R., 35–37.)

In this letter the surveyor-general transmits to the Commissioner his certificate that the lands selected are "not mineral and are vacant," giving the reasons on which he bases this certificate. He then says, "I have refunded to Mr. Gilpin the money placed in my hands, and he has paid for the survey *as a private survey*, though he has permitted me to make an abstract of the field notes."

(*h*) LETTER FROM THE COMMISSIONER OF THE GENERAL LAND OFFICE REJECTING THE CERTIFICATE AS TO THE CHARACTER OF THE LAND. (R., 37.)

In this letter the Commissioner acknowledges receipt of the certificate and the letter inclosing the same, and again calls attention to his explicit instructions with reference to ascertaining the value of the land, and states that the evidence furnished by the surveyor-general is not sufficient, in his opinion, to prove that this selection does not cover valuable mineral deposits, and also again calls attention to the statement of Governor Gilpin as to the character of the land.

(*i*) LETTER OF THE COMMISSIONER OF THE GENERAL LAND OFFICE, FEBRUARY 12, 1864, AUTHORIZING QUALIFIED APPROVAL OF THE SURVEY. (R., 38–39.)

In this letter the Commissioner, in order to avoid the difficulty arising from an unauthorized survey of the claim and to save the expense of a resurvey, suggests the following course: "The original field notes, duly

verified and authenticated, must be filed in the surveyor-general's office of Colorado. Upon bringing these to the usual satisfactory tests, and finding the same all regular and correct, you are authorized, in virtue of the aforesaid sixth section of the said act of June 21, 1860, to approve the said survey, and in this certificate of approval you will add the special reservation stipulated by the statute, 'not to embrace mineral land, nor to interfere with any other vested rights, if such exist.'"

(*j*) LETTER FROM COMMISSIONER OF THE GENERAL LAND OFFICE TO SURVEYOR-GENERAL, FEBRUARY 26, 1864, INCLOSING PAPERS.

This letter shows that Mr. Gilpin had deposited certain papers in the office of the Land Commissioner at Washington, including the application for the survey, estimated cost of the same, surveyor-general's receipt for amount deposited to pay for the survey as reported by the surveyor-general October 13, 1863, and a certificate of the register and receiver that the lands covered by grant No. 4 are not mineral and are vacant, and the field notes of the boundary lines of the above grant, together with a plat thereof. The concluding sentence of this letter is as follows: "These papers were deposited in this office by Mr. Gilpin, and are transmitted to you for such action as you shall deem proper in the premises, *in accordance with the views expressed in our communication to you, dated the 12th instant.*"

(*k*) FIELD NOTES OF THE SURVEY OF GRANT NO. 4. (R., 39–52.)

These field notes show that the survey was commenced on October 22 and concluded on November 4, 1863,

making thirteen days, including Sundays. The actual survey is shown to have commenced on October 24 and to have been concluded on November 3.

(*f*) Approval of field notes and survey. (R., 52.)

The field notes of the survey were approved by the surveyor-general of Colorado on March 15, 1864. The map of the survey was approved March 18, 1864, the latter approval being qualified thus: "Which have been examined and approved, subject to the conditions and provisions of section six of the act of Congress approved June 21, 1860." These were transmitted to the Commissioner of the General Land Office on March 29, 1864, and the letter acknowledging their receipt was written by the Commissioner on May 4, 1864.

On May 1, 1864, the heirs of Luis Maria Baca conveyed their interest in this property to John S. Watts, and on November 6, 1877, the property is conveyed to William Gilpin *in conformity with the covenants of the agreement above referred to*, dated February 17, 1862, and the plaintiff in this case deraigns title from Gilpin.

This concludes the documentary testimony as to the title of this land, all documents of a subsequent date introduced in evidence being merely descriptive or constructions of those referred to above, the most important of which is the letter of J. A. Williamson, then Commissioner of the General Land Office, to the surveyor-general of Colorado, dated March 24, 1879, which arose out of an application of William Gilpin for patent to the entire tract of land known as Baca Claim No. 4 in Colorado.

The Commissioner refuses the application, and, in giving his reasons for this refusal, attempts to construe the acts of his predecessors as conclusive against the Government upon the question of the nonmineral character of the land. This reasoning is practically reiterated in subsequent letters, one dated June 28, 1884, by N. C. McFarland, Commissioner, and the other dated June 8, 1889, by William M. Stone, Acting Commissioner; but none of these subsequent letters are based upon any hearing or testimony as to the character of the land, nor is any new finding made upon the question, but, on the contrary, it is shown by them all that they are mere expressions of opinion as to the legal result of acts of former officers of the Government.

At the conclusion of the testimony, the court instructed the jury that the plaintiff was not entitled to recover as to the mineral land in dispute, and the jury returned a verdict for the defendant under this instruction.

The case was taken by writ of error to the United States circuit court of appeals for the eighth circuit, and is pending in this court on a return to the writ of certiorari to that court.

The contentions of the parties may be stated in a few words. On the part of the plaintiff it is that by the act of Congress above recited, the selection by the heirs of Baca, and the survey and other proceedings by the officers of the Government, the Baca heirs, or their representatives, had acquired the absolute title to this property prior to the discovery of mineral thereon, and that the action of the officers of the Government, with refer-

ence to such selection and survey, operated as an adjudication and estoppel, as against the Government and those claiming under it, upon the question as to the mineral or nonmineral character of the land, and though the land is now admitted to be mineral, and hence excluded by the terms of the grant, yet by reason of the proceedings and adjudication above referred to the Government of the United States, and all claiming under it, are estopped to claim that the question as to the mineral character of the land is, or was in 1876—the time when mineral was discovered—open.

The defendant claims that there has been no adjudication as to the mineral or nonmineral character of the land; that no action has been taken by the officers of the Government which estop it to claim that the land is mineral, and hence not within the terms of the grant, and that the question as to the mineral character of the land being still open, and this land being admittedly mineral in character, is excluded from the grant; and hence the plaintiff showed no title.

This being the state of the record, the interest of the United States in this controversy is apparent, for if plaintiff's contention prevails the land in dispute, as well as other land of like character within the surveyed boundaries of the selection, passed by the grant, while if the defendant's contention be correct all such land remains a part of the public domain; and it, therefore, through its proper officers, has seen fit to ask permission of this court to file this brief in support of the contention of the defendant in error.

BRIEF AND ARGUMENT.

I.

This is an action in ejectment, in which the plaintiff must recover, if at all, on the strength of his own title. The complaint admits that the lands sued for are "mineral lands." The plaintiff must, therefore, show title to mineral lands. The grant on which plaintiff bases his right to recover, instead of being for mineral lands, is for "vacant land, *not mineral*."

Upon this simple statement of the case, it would seem that plaintiff can not recover, because he does not deraign title to mineral lands.

II.

But, although the mineral character of this land is a fact which, if it now exists, existed at the date of the grant and at the date of the selection, the plaintiff claims that, because this land was not known to be mineral at the date of the grant, at the date of the selection, and at the date of the survey and location, title passed to the grantees, notwithstanding the reservation in the grant. It goes without saying that the lands were the same when selected, surveyed, and located as they are now, and were, therefore, in fact "mineral" at that time. This contention of the plaintiff may then be reduced to this, that the act of Congress must be construed as granting all lands not known to be mineral at the time of the selection and location.

Is it permissible to so construe this act of Congress? We submit that it is not; first, because that would be to

interpolate a term not found in the act and to violate the rule which forbids the enlargement of public grants by implication; and second, because the circumstances attending the grant are inconsistent with such a construction.

At the date of this grant little was known of the territory then called New Mexico, and the mineral developments in the United States were then in a very primitive stage. Silver mining had not existed in the United States more than one year previous to the date of this grant, and the first discovery of precious metals in the Rocky Mountains antedated this grant but a very few years. The policy of the Government at that time, like that of all governments, was to encourage to the utmost the exploration for the discovery and development of the precious metals, and the intent of Congress, in incorporating into the act in question the reservation respecting mineral land, was in harmony with this well-known general policy. What were mineral lands and what were not could only be known through long, arduous, and expensive prospecting and experiment; it could not be determined by a mere examination of the surface.

It is respectfully suggested, therefore, that in view of this well-settled policy of the Government, and of the well-known difficulty of ascertaining the mineral or non-mineral character of the land, it was not the intent of Congress, in incorporating into this act the reservation in respect to mineral lands, to give to the heirs of Baca such a roving commission as would permit them to interfere with the exploration and search for the precious metals in the mountain ranges of the country, or with the

location and development of such mineral lands when found.

It could not have been intended by Congress that this reservation should only comprehend lands then known to be mineral. While mineral had then been discovered in many places in the Rocky Mountains, enough so as to render it presumable that mineral was generally distributed throughout their full extent, it was not and could not be known in what particular localities precious metals might be found, and in what they would not be found. To hold, under these circumstances, that the reservation applied only to known mineral lands, is to render such reservation meaningless and practically without force.

Nor could Congress have meant to reserve only lands not known to be mineral at the time of the selection, for such selection was the act of the heirs of Baca in which the Government had no voice and over which it had no control. Those heirs were at liberty to select such lands as they chose, and it certainly was not the intention of Congress that so important a reservation as this was made only to be ignored by a mere selection of the parties in interest.

Nor could Congress have meant to reserve only lands not known to be mineral at the time of the survey and location, for the surveyor-general was required by the act to survey and locate "the lands so selected by said heirs of Baca when thereunto required by them." The surveyor-general had no voice as to what lands he should survey, nor as to what lands he should locate. He was required by the act to survey and locate such

lands as had been selected by the Baca heirs whenever they should require him to do so. Hence it is, that up to the time of the location and survey, the Government had no right to interfere in any way with the right of the Baca heirs to select and have surveyed and located such lands as they might desire.

But it is contended by the plaintiff that the action and report of the surveyor is conclusive, and counsel for plaintiff in their brief quote at length from the report of the surveyor as to the nonmineral character of this land. Notwithstanding these quotations, however, and the apparent confidence with which counsel rely upon the report of the surveyor and the action of the surveyor-general, it is apparent from their brief and their entire argument that they rely upon the acceptance of the field notes of the survey and map by the Commissioner of the General Land Office as the final act necessary to vest this title.

While the Commissioner of the General Land Office and the Secretary of the Interior make use of these public surveys, no conclusive effect is to be given to them, either in favor of the Government or against it, in determining whether lands are mineral or nonmineral. The reason for this, and the general character of the Government surveys, are disclosed very clearly in the opinion of Secretary Smith in *Wescott* v. *Northern Pacific Railroad* (17 L. D., 274), where he says (p. 275):

> The act of May 18, 1796 (1 Stat., 464), now embodied in section 2395 of the Revised Statutes, prescribed many of the rules which are yet followed in surveying the public lands. It directed that the

land be laid off into townships 6 miles square, by running lines north and south, to be crossed by others running at right angles to them. The corners of each township were to be marked and also each distance of a mile between the corners. The townships were to be divided into sections of 640 acres each, by running through the townships, each way, parallel lines "at the end of every 2 miles, and by making a corner on each of said lines at the end of every mile." Thus the outlines only of every other section were run, the corner of the intermediate section only being then fixed, and the outline thereof being protracted on the plat when made.

Subsequently Congress directed that the lands be sold by half and quarter sections, and the surveyor-general was directed to thus divide the sections by north and south and east and west lines protracted upon the plats, it not being intended that he should "run the subdivisional lines." (2d Public Land Laws, 820; *ibid.*, 854.

Subsequently the Commissioner of the General Land Office issued a "manual of surveying instructions for the guidance of surveyors and their deputies. By this manual it was directed that the outlines of each section be actually surveyed and the quarter-section corners established on the line as run. This manual has been legalized by act of Congress, and is deemed to be part of every contract for surveying the public lands." (R. S., sec. 2399.) As the public lands are only surveyed by contract they must necessarily be surveyed according to the manual, and thus, indirectly, the law requires that the outlines of each section should be actually surveyed.

It results, therefore, that only the section lines or rather the outlines of the sections are run, the minor subdivisions not being surveyed in the field.

The surveyor-general in making his plats merely protracts these imaginary subdivisional lines in red ink upon the plats, connecting the opposite corners both ways, thus making the quarter sections; these, in turn, are again subdivided in like manner into quarter quarters or 40-acre tracts. (Public Domain, 184.) So that there is no law nor instructions requiring the surveyor, in his line of duty, to go anywhere than along the borders or outlines of the section he is surveying.

By the same act of 1796 (R. S., 2395, sec. 7) it is provided that "every surveyor shall note in his field book the true situation of all mines, salt licks, salt springs, and mill seats which come to his knowledge, all water courses over which the line he runs may pass, and also the quality of the lands."

It is under this last provision that the report of the surveyor is made, which creates the presumption referred to.

The surveyor, as a public officer, must follow the law, and that does not require him or afford him an opportunity to pass over the interior or body of the section he is surveying. He is directed to report the situation of "all mines" that "come to his knowledge," and all water courses over which "the line he runs may pass." He is not directed to search for mines or water courses, but to report such as come to his knowledge whilst passing along the outlines of the section he is surveying. This is all he is required to do in the discharge of his duty. The law nowhere says that the report thus made is to be conclusive of even matters of fact reported; and certainly it would be contrary to all rules of sound reason to hold that such a report is to be conclusive or even presumptive negatively—that is, of matters not reported.

The most that can be said in favor of such a report is that it raises a presumption as to the belief or opinion of the surveyor as to the matters of fact affirmatively stated by him. These instructions to the surveyor relate only to his report of "mines." He may or may not report that the lands indicate that valuable minerals are hid beneath their surface. Such indications are not "mines." A report to that effect, not being required by the law, is optional with him. Being something beyond his required duty, no conclusion of law arises from it. It is merely a statement of the officer, more or less valuable according to his opportunities of observation, and ought not to preclude the assertion of any right or the proof of the facts of the case as they really exist.

It has been seen how limited are these opportunities of observation, the officer merely passing over the confines of the section, with his attention more directly absorbed by the duties of his scientific profession and the necessity for absolute accuracy in his courses and distances. Even were he a geologist or mineralist, his opportunities of observation along the course of his lines would be the scantiest, and beyond those lines, or on either side of them, his duties do not carry, but prohibit him from going. So that, practically, the interior of the section, or that portion thereof not immediately along the line being run, is beyond the observation or knowledge of the surveyor, and his opinion in relation to the same can not be of much value. So that the report of the surveyor must necessarily constitute but a small element of consideration when the question is as to the true character of the land.

And this has been the ruling of the Department and the courts for a long time. See *Ode* v. *Markley*

(2 L. D., 847), where the subject is ably and exhaustively discussed and numerous authorities cited to sustain the views herein stated.

In the case cited it was a question as to the effect of report of the surveyor that certain lands were salines. After reviewing all the decisions and discussing the subject at great length, Secretary Teller said, on p. 851:

"These cases seem to be decisive of the issue raised in the case at bar, and to establish the rule that a notation of 'saline' on the plats, or its omission, is immaterial, and that no land but that in fact saline is reserved from agricultural entry. * * * The character of the lands is a question of fact, to be determined by due proofs, and the qualified party who first settles upon them, or applies to enter them, and otherwise conforms to the law, has priority of right when their nonsaline character is determined."

To the same effect is the case of *Robinson* v. *Forrest* (29 Cal. Rep., 317, 321); *Merril* v. *Dixon* (15 Nev., 401, 405, et seq.); *Morton* v. *Nebraska* (21 Wall., 660, 674). The surveyor's report in this case, therefore, has but little weight with me in its determination.

If the report of a regular deputy surveyor who runs the exterior lines of every section has but little weight with the Department in the determination of these questions, how much less weight should be given to the report of a surveyor who has only run the exterior lines of a piece of land 12½ miles square, and where the actual time occupied in so running these 50 miles of lines is only ten or eleven days?

No question is raised in this case as to the character or amount of precious metals necessary to make lands

mineral, for the allegation is that these lands are "mineral-bearing lands" and that "discoveries of precious metals" have been made within the boundaries of the grant. In other words, it is conceded by the declaration in this case that the conditions existed, whatever they may be, which were necessary to bring the land within the description of the reservation in the act. Nor does the fact, if conceded, that this is a grant *in præsenti*, in any way aid the plaintiff in this case, for, if the grant be *in præsenti*, the exception is also *in præsenti*, and no matter when the grant attaches, it can not attach to mineral lands, for they are not granted, but are expressly reserved.

III.

But it is said that this construction, or any construction which excludes lands in fact mineral from the operation of the grant, works a hardship, because it leaves the title to the lands forever uncertain, and liable to be defeated at any time by the discovery of mineral. As we shall attempt to show hereafter, this is one of the cases where "*nothing but a patent*" passes a perfect and consummate title, and as, before a patent can issue, there must be a finding and ascertainment by the Secretary of the Interior, or by one of his subordinates under his direction, that the facts exist which authorize the issuance of the patent, it is evident that before a patent can issue the question as to the character of the land under this grant must be passed upon by the Secretary of the Interior, or by some officer of that Department under his direction; that is to say, before a patent could issue under

this act of Congress it would be necessary for the Secretary of the Interior, or some subordinate under his direction, to ascertain whether the land claimed was vacant and whether the same is nonmineral.

The case of *Davis* v. *Weibbold* (139 U. S., 520) is cited by counsel for the plaintiff on this proposition. In this case Mr. Justice Field, quoting the language of Judge Sawyer in *Cowell* v. *Lammers*, says:

> There must be some point of time when the character of the land must be finally determined, and for the interest of all concerned there can be no better point to determine this question than at *the time of issuing the patent*.

And again, at page 523, the same justice quotes with approval the following language of Mr. Justice Lamar while Secretary of the Interior:

> *The issue of the patent* was a determination by the proper tribunal that the lands covered by the patent were granted to said company, and hence, under the proviso of said act, were not mineral at the date of the issuance of the patent.

And again, at page 524:

> *The grant or patent, when issued*, would thus be held to carry with it the determination of the proper authorities that the land patented was not subject to the exceptions stated.

But it is alleged by counsel for plaintiff in error that no patent was necessary in this case, and that no patent could issue upon this act of Congress, and hence that the language of Mr. Justice Field in the Weibbold Case is not applicable to the case at bar.

IV.

IS PATENT NECESSARY TO PASS A PERFECT AND CONSUMMATE TITLE UNDER THE ACT?

It is, of course, beyond question that Congress may grant lands so as to convey a legal title without patent, and it is also true that many acts of Congress granting lands have been passed which are self-executing and which are of themselves equivalent to conveyances, but it is a general rule, and one which has few exceptions, that nothing but a patent passes a perfect and consummate title from the Government.

In the case of *Bagnell* v. *Broderick* (13 Peters, 436 L. C., 450) the court says:

> Congress has the sole power to declare the dignity and effect of titles emanating from the United States, and the whole legislation of the Federal Government in reference to the public land declares the patent the superior and conclusive evidence of legal title. Until its issuance the fee is in the Government, and by the patent it passes to the grantee.

In the case of *Wilcox* v. *Jackson* (13 Peters, 436, L. C., 516), this court says:

> We think it unnecessary to go into a detailed examination of the various acts of Congress for the purpose of showing what we consider to be true in regard to the public lands, that, with the exception of a few cases, nothing but a patent passes a perfect and consummate title. One class of cases to be excepted is where an act of Congress grants land, as is sometimes done, in words of present grant. But we need not go into these exceptions; the general rule is what we have stated.

In the case of *Carter* v. *Ruddy* (166 U. S., 493) the court had under consideration an act of Congress, approved July 17, 1854 (10 Stat. L., 304). By this act the President was authorized to exchange with certain half-breed Indians, for a tract of land to which they were entitled, other lands in lieu thereof, and upon relinquishment by them to the United States of their interests in their lands, the Commissioner of the General Land Office was authorized to issue to such half-breed Indians certificates or scrip for the same amount of land to which each individual would be entitled in case a division of their lands was made, and the act contained this provision: "Which said certificate, or scrip, may be located upon any lands within said reservation not now occupied by actual and *bona fide* settlers, etc."

This act created indemnity grants, or floats, similar in every particular, except as to the reservation of mineral, to that created by the sixth section of the act of 1860, and the interest acquired by the half-breed Indians named in the act, in the lands upon which these certificates were located, is identical, as a matter of law, with the interest of the heirs of Luis Maria Baca in the land selected by them under the act of 1860, the only difference being that, in one case, the right to select was evidenced by certificates issued by the Commissioner of the General Land Office, while in the other the right to select was given by the act of Congress itself. The legal status of the holders of these certificates under the above-recited act, after the same had been located and before patent was issued, was before this court in the above case, and this case seems to be decisive of the one at bar

in respect of this question. The contention there was, as it is here, that the location of the scrip operated to transfer the legal title of the land so located to the locator; that no patent was necessary, and that the legal title was in him by virtue of the act of Congress and the certificate and the location. With reference to this, Mr. Justice Brewer, speaking for the court, says:

> While it is true that the act of 1854 does not, in terms, provide for the issue of a patent, and simply authorizes the location of the scrip upon any public land, yet the general rule is that a patent is necessary for the transfer of the legal title.

He then cites with approval the quotation cited from *Bagnell* v. *Broderick* and *Wilcox* v. *Jackson*, and disposes of the question thus:

> There is nothing to exempt this case from the ordinary rule that a patent is necessary to convey the legal title; that the certificate and location create at best but an equitable title.

In the case of *Stoneroad* v. *Stoneroad* (158 U. S., 240), where a grant confirmed by the first section of the act of June 21, 1860, was under discussion, the court says:

> At the time of the passage of this act, and for a long time prior thereto, the general laws of the United States confided to certain administrative officers the duty of surveying not only the public lands, but also private land claims. The practice of the United States in dealing with the public domain and all governmental grants of lands is to survey and *issue a patent*.

It being the general rule that nothing but a patent will operate to divest the United States of its legal title

to the public domain, there is nothing in this case which makes it an exception to that general rule. Every act of Congress which has been held to be an exception to this rule contains language evidencing an intention on the part of Congress that the act itself should operate to transfer the title and should be self-executing. Such grants are included in other sections of the very act under discussion. Section 1 of the act provides: "That private land claims in the Territory of New Mexico, as recommended for confirmation by the surveyor-general of that Territory, * * * *be and they are hereby confirmed.*" These words, or their equivalent, have always been held to evidence an intention on the part of Congress to make a present grant; that is to say, the act of Congress containing these words is self-executing. Section 3 of this act contains the same language.

Many cases are cited construing grants of this character, and as the rules justly laid down in these cases are invoked by counsel for plaintiff in error in this case, it may not be amiss to examine the granting words contained in the acts thus construed, with the view of ascertaining whether the words used by Congress in the sixth section of the act of June 21, 1860, should receive the same construction.

The first case cited is *Rutherford against Greene's heirs* (2 Wheaton, 197). The grant under discussion in that case was made by the State of North Carolina in 1782, and provided "That twenty-five thousand acres of lands shall be allotted for and given to Major-General Nathanael Greene."

In pursuance of the direction of the act, commissioners allotted twenty-five thousand acres of land to General Greene, and caused the tract to be surveyed.

On the 12th of April, 1783, the general assembly of North Carolina passed "An act for opening the land office," the provisions of which, it was contended, revoked or recalled the gift made by the act of 1782 to General Greene. In 1784 an act was passed authorizing the issuance of a grant or patent to General Greene, and pursuant to this act the grant or patent was issued, and the question at issue was, (1) whether the act of 1783 operated as a revocation of the grant to General Greene, and (2) whether the act of 1782 did not operate to vest such a title in General Greene as would support the grant paper or patent issued under the act of 1784; and the court held that the act of 1783, when properly construed, did not operate to revoke the gift of 1782, that the rights vested in General Greene by the act of 1782 were not impaired by the act of 1783, and, to use the language of the court, "and that it (the title) *is completed by the grant which issued in pursuance of the act of 1784*, and which relates to the inception of the title."

This is all there was in that case. There was no condition or reservation in the grant, and no question analogous to the question in this case arose or was decided in that case, unless it be in that portion of the opinion quoted above, which clearly indicates that in the opinion of the court the issuance of a grant was necessary to "complete" the title.

The next case cited is *Grigson's Lessee against Astor* (2 How., 310). The grant under discussion in that case

was approved February 1, 1823 (3 Stat. L., 724), and the granting clause is as follows:

"Such persons *are hereby confirmed in their claims*, agreeably to any surveys heretofore made," etc. These words, so well understood at this date, are self-executing and are sufficient to show an intention to make a present grant, and are entirely different from the words used in the act of Congress now under discussion.

The case of *Strother against Lucas* (12 Peters, p. 454) construed the provisions of an act of Congress approved June 13, 1812, and the words of the granting clause, construed by the court in the excerpt of the opinion quoted in that case and in the brief of counsel for plaintiff, are as follows:

> That the rights, titles, and claims to town or village lots, etc., shall *be, and the same are hereby, confirmed* in the inhabitants of the respective towns and villages aforesaid.

The statute before the Supreme Court in the case of *Chateau against Eckert* (2 How., 372) is to be found at the Fifth Statute at Large, page 126, and the granting words are as follows:

> That the decisions in favor of land claimants made by the recorder of land titles in the State of Missouri, and the two commissioners associated with him * * * *be, and the same are hereby, confirmed.*

In *Ryan and others against Carter and others* (93 U. S., p. 78), the court had under consideration the act of June 13, 1812 (2 Stats., 748), and the words construed and held to operate as a grant *in presenti* are as follows:

> That the rights, titles, and claims to town or village lots * * * adjoining and belonging to the

> several towns or villages, * * * shall *be, and the same are hereby, confirmed* in the inhabitants of the respective towns or villages aforesaid.

The granting words in all these acts, as well as in the subsequent acts granting lands to railroads, which have been repeatedly construed by this court to operate as self-executing grants, have all contained the words "be and are hereby granted," or the words "be and are hereby confirmed," or words having equivalent meaning and evidencing the same intention.

In the Union Pacific grant of July 1, 1862 (12 Stat. L., 489), the granting words are "That there *be and is hereby granted* to said company," etc.

In the Northern Pacific Case (see act of July 2, 1864, 13 Stat. L., p. 365) the granting words are "That there *be and hereby is granted*," and in the Atlantic and Pacific Case (see act of July 27, 1866, 14 Stat. L., 293) the granting words are identical with those above quoted.

As is said by Mr. Justice Davis, in the case of *Railroad Company against The United States* (92 U. S., p. 733; L. C., p. 741):

> "*There be and is hereby granted*" are words of absolute donation and import a grant *in praesenti*. This court has held that they can have no other meaning, and the land department on this interpretation of them has uniformly administered every previous similar grant.

A comparison of the several acts of Congress, which have been construed by this court as self-executing grants *in praesenti*, with the act of 1860, giving permission to the heirs of Baca to select a quantity of vacant land, not mineral, in the Territory of New Mexico, will show a

broad line of demarcation, and will, we think, show conclusively that it was not the intention of Congress, by the act of 1860, that the absolute title to this land should pass to the grantees and the Government be concluded, without some opportunity on the part of its officers to pass upon the character of the land.

It will be noted that the substantial language of the act is as follows:

> That it shall be lawful for the heirs of Luis Maria Baca to select, instead of land claimed by them, an equal quantity of vacant land, not mineral, in the Territory of New Mexico, etc.

In the Northern Pacific grant occurs the following language:

> Whenever * * * any of said sections or parts of sections shall have been granted, sold, reserved, * * * or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior.

In the Atlantic and Pacific grant (14 Stat. L., p. 295) occurs exactly the same language.

And this clause of these statutes is, as is the act of 1860, purely and simply an indemnity grant. These indemnity clauses have never been held to operate as self-executing grants, and have never been considered as effectually passing the title out of the Government until the lands have been selected and such selection formally approved, or the land patented, by the officers of the United States. That there is a broad distinction between "granted lands" under grants which are self-executing

and take effect *in præsenti* and "lieu" or indemnity lands, as to which title passes only when the same have been selected and such selection approved, is well settled by this court in the case of *Wisconsin R. R.* v. *Price County* (133 U. S., 496).

That this has been the opinion and practice of the Interior Department is shown by the decision of Secretary Noble in *Central Pacific Railroad Company* v. *Valentine* (11 L. D., 238–246):

> The very fact, if it be true, that the office of the patent is to define and identify the land granted, and to evidence the title which vested by the act, necessarily implies that there exists jurisdiction in some tribunal to ascertain and determine what lands were subject to the grant and capable of passing thereunder. Now, this jurisdiction is in the Land Department, and it continues, as we have seen, until the lands have been either patented or certified to or for the use of the railroad company.
>
> By reason of this jurisdiction it has been the practice of the Department, for many years past, to refuse to issue patents to railroad companies for lands found to be mineral in character at any time before the date of patent. Moreover, I am informed by the officers in charge of the mineral division of the Land Department that ever since the year 1867 (the date when that division was organized) it has been the uniform practice to allow and maintain mineral locations within the geographical limits of railroad grants, based upon discoveries made at any time before patent, or certification, where patent is not required. This practice having been uniformly followed and generally accepted for so long a time, there should be, in my judgment,

the clearest evidence of error, as well as the strongest reasons of policy and justice, controlling before a departure from it should be sanctioned. It has, in effect, become a rule of property.

V.

ESTOPPEL. RES ADJUDICATA.

Has the question of the nonmineral character of this land been passed upon by competent authority, so as to estop or bind the United States?

In examining questions relating to former adjudications or estoppel by the record, the first question to discuss is that of jurisdiction; that is to say, we should first ascertain what court, body, or officer has power under the law to make the adjudication or create the estoppel alleged.

From plaintiff's brief it is not exactly clear where counsel think the jurisdiction to decide this matter rests. On pages 19 and 20 of their supplemental brief counsel use this language: "The statute specifically designated an officer of the Government, to wit, the surveyor-general, to make survey and location of the lands selected. The use of these words, taken in this connection, must mean that the surveyor-general was not only to officially determine the boundaries of the land, but to confine the selection to the character of land authorized to be taken. His official approval, therefore, must amount to a decision that the land by him surveyed and located is of the character designated by the statute."

This extract from the brief would indicate that it was the opinion of counsel for plaintiff that the power to

adjudicate this question and the power to create this estoppel, as against the Government, rested with the surveyor-general under the act. It is fairly inferable from the statements of counsel on page 16 of the same brief and on page 52 of their original brief that the power to make this adjudication and create this estoppel is with the Commissioner of the General Land Office.

In order that there may be no confusion as to this question, it is perhaps best to examine it as an original one.

The act of Congress itself does not expressly authorize any person to pass upon this question and does not point ut any method by which the United States can be protected against the selection of any lands that the grant claimants may see fit to select. The act provides that "it shall be lawful for the heirs of Baca * * * to select * * * an equal quantity of vacant land, not mineral, in the territory of New Mexico, to be located by them in square bodies, not exceeding five in number."

Under this act the power to make selection of the land to satisfy this grant is vested in the heirs of Baca. They are the sole judges of what lands are to be selected and located. That the mere selection and location of the lands by the heirs of Baca could not operate as an adjudication or estoppel against the Government seems to be axiomatic, if it be borne in mind that they are the sole judges of the land to be selected and located. Can any man be a judge and make an adjudication in his own favor against another? Can any man create an estoppel against another by any transaction in which he himself is the only participant? Could the heirs of Baca by their own conduct,

ignoring the very provisions and limitations which Congress had incorporated into the act for the protection of the Government in the transaction, gain an advantage to themselves and against the Government? These questions seem to furnish their own answers; and with reference to the powers conferred on the surveyor-general by this act, it seems to me that we are left in the same predicament. He is required "to make survey and locations of the lands so selected by said heirs of Baca * * * when thereunto required by them." He has no discretion in the matter, but is commanded by the act to survey and locate such lands, and such lands only, as have been selected by the Baca heirs.

It will thus be seen that the act itself contains no express provision for an adjudication such as is set up by the plaintiff in this case. The only parties expressly authorized to participate in the selection and location of this land by the act itself are the Baca heirs and the surveyor-general. They are permitted to select such land as they please, and he is required to survey and locate the lands so selected, the Government being left out of the question altogether and having no voice in the selection and no control over the survey, except that the same must be accurate and in accordance with the rules of the Department.

It can not be that Congress intended that the mere selection of the lands by the Baca heirs and the survey and location of the lands thus selected by the surveyor-general should of itself operate as an adjudication or as an estoppel against the Government as to the character of the land. Neither the Government nor any of its

officers have had an opportunity to be heard or to adjudicate upon the matter.

Resort must then be had to the general laws of the land in order to ascertain where rests the power to adjudicate upon matters of this kind and to make a finding which shall operate as an estoppel against the Government. Such an authority is found in sections 441, 453, and 2478 of the Revised Statutes.

By section 441 "the Secretary of the Interior is charged with the supervision of public business relating to the following subjects * * * the public lands, including mines."

By section 453 "the Commissioner of the General Land Office shall perform, under the direction of the Secretary of the Interior, all executive duties appertaining to the surveying and sale of the public lands, or in anywise appertaining to such public lands, and also such as relate to private claims of land, and the issuing of patents for all grants of land under the authority of the Government."

And by section 2478 "the Commissioner of the General Land Office, under the direction of the Secretary of the Interior, is authorized to enforce and carry into execution, by appropriate regulations, every part of the provisions of this title (public lands) not otherwise specially provided for."

Here, then, is found a tribunal and here the power to adjudicate upon the question as to the character of this land, and an adjudication by the Secretary of the Interior, or by the Commissioner of the General Land Office,

under his direction, is binding upon the Government. No other person or tribunal is vested with this power.

Recognizing this to be true as a legal proposition, counsel for plaintiff have sought to establish such an adjudication—

(*a*) By the letter of February 12, 1864, authorizing the surveyor-general to approve the survey;

(*b*) The approval by the surveyor-general of the survey and the map, and

(*c*) By the receipt and filing in his office of the field notes and map, with approval indorsed thereon.

First, as to the letter of February 12, 1864. It will be remembered that the status of affairs at this time was this: That a private survey had been made by Sheldon and paid for by Gilpin, which had no validity as against or binding force upon the Government or anyone else. It is assumed, on page 16 of plaintiff's supplemental brief, that Governor Gilpin was in the office of the Commissioner of the General Land Office when this letter was written, or had been there while this subject was being considered, and it is, perhaps, a fair inference that this letter was written at the suggestion of Governor Gilpin, in order to save him the trouble, delay, and expense of a second survey. This authority was given by the Secretary outside of the regulations of his Department, and is expressly stated to be as a means of "avoiding the difficulty which exists with reference to this survey." It will be remembered that the Commissioner at that time had before him, and evidently had in mind, his former correspondence with reference to the mineral character of

this land and to the knowledge or belief, on the part of Mr. Gilpin, that this was mineral land. Hence the condition of permitting the surveyor-general to approve a survey which was expressly stated to be irregular. That condition is as much a part of this letter of authority as the authority itself, and by it the surveyor-general was directed in his certificate of approval to "add the special reservation stipulated by the statute, but not to embrace mineral land, nor to interfere with any other vested rights, if such exist." Without this latter authority the surveyor-general had no power to approve this private survey at all. With it he had power to approve it only with the qualification specified in the letter of authority.

It is sought by counsel for plaintiff to construe this qualification as applying to known mineral lands only, and not to such as might be discovered to be mineral subsequent to the selection, survey, and location and before the issuance of patent, and he seeks to draw this conclusion from the use of the language, "other vested rights," and says "the word 'other,' by the inexorable rules of language, must carry the idea of 'vested rights' back to the mineral land referred to in the same sentence." As a grammatical proposition, this is undisputed, but it does not in any way aid counsel or lead to the conclusion reached by them. The United States Government has a "vested right" in all mineral underlying the public domain, and it is unnecessary that rights shall have been vested in any private individual in order to be protected by this provision of the statute; in fact, the very object of this provision was to protect the

"vested right" of the Government in the mineral land of the country, and it is to this "vested right" that the word "other" undoubtedly relates.

As has been said, the authority of the surveyor-general to approve this survey was limited by this letter of authority. Whether the Commissioner had in his mind the suspicion which grew out of Gilpin's communication to Surveyor-General Chase, or whether he had in mind the fact that this survey was a private survey, paid for by and made under the direction of Mr. Gilpin, the instructions given to the surveyor-general are plain. Whatever of authority he had as to that private survey he had under those instructions. The plaintiff must take these as a whole or repudiate them altogether. He can not accept that part which is favorable to him and reject that portion which he deems will prejudice him. If he repudiates those instructions he has no official survey at all; if he accepts them and the certificate made under them, then the reservation of the mineral land remains in these proceedings, from the granting act to the last official act in connection with the land—the certificate of approval by the surveyor-general.

As has been said, the granting act under discussion makes no express provision for the ascertainment and determination of the question as to whether lands selected, surveyed, and located are of such a character as to be subject to the grant. It has also been seen that the general law does make provision for such ascertainment and for the protection of the Government in respect of these, as well as all other questions pertaining to the public lands, and that jurisdiction of such question is vested in

the Secretary of the Interior, or the Commissioner of the General Land Office, under the direction of the Secretary.

This act, then, will be read in view of this provision of the general law. It was certainly not the intention of Congress that the Government should be concluded as to the character of this land until the question had been determined by some properly constituted authority.

Reading this act then in view of these provisions of the general law, and it will be construed to mean that the selection and location of these lands by the heirs of Baca must be under the direction of the Secretary of the Interior, and of course subject to the General Land Office.

If this be a proper construction of the act, it is impossible to distinguish its meaning from that of the indemnity provision in the numerous grants in aid of the construction of railroads made by Congress. For instance, the indemnity provision of the act granting lands to the Northern Pacific Railroad is as follows:

> Whenever * * * any of said sections, or parts of sections, shall have been granted, sold, reserved, * * * or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior.

In the Atlantic and Pacific grant (14 Stat. L., p. 295) occurs exactly the same language.

In these grants, as well as in the one under discussion, the land is to be *selected* by the beneficiary *in lieu* of other lands otherwise disposed of, and to which the beneficiary

would but for such disposition have been entitled. The nature of the right or title passing by such provision was thoroughly settled by this court in the case of Wisconsin Railroad Company *v.* Price *supra*, in the opinion in which case the court says: "For such lands no title could pass to the company, not only until the selections were made * * * but until the selections were approved by the Secretary of the Interior."

And again, "the approval of the Secretary was essential to the efficiency of the selections and to give to the company any title to the lands selected. His action in the matter was not ministerial, but judicial. He was required to determine whether the particular indemnity lands selected could be properly taken for this purpose."

In the course of this opinion the court further declared that the Secretary must determine whether any of the lands selected were otherwise appropriated, and that such action was required for the protection of the United States against improper appropriation of its lands; that until such selections were approved there were no selections in fact.

So in this case it was not the duty of the Secretary to determine whether these lands "were vacant" and "not mineral," the language of the act requiring that only such lands could be selected.

It must be conceded that the jurisdiction to determine whether the lands selected were vacant or nonmineral vested somewhere other than in the grantee, and it seems to us that there can be no question that it was the intention of Congress to make this grant that the jurisdiction

and power to decide this question should rest with the Secretary of the Interior, where the general law had placed it.

The condition of this title, as shown by the act of Congress and the proceedings with reference to the mineral character of this land, as has already appeared, is as follows: The granting act reserved the mineral; the authority given by the Commissioner of the General Land Office to the surveyor-general directed him to include the reservation as to the mineral land in his certificate; the reservation *was* included in his certificate, and the plaintiff in error occupies the unenviable position of asking for a judgment based upon the existence of a fact which he alleges in his pleading is not a fact. He claims title to a tract of land as being *nonmineral*, which, by the allegations of his complaint and his own proof, is shown in fact to be *mineral* land. He claims title to a tract of mineral land as having been granted by an act of Congress which expressly excluded mineral land from its operation. He claims an adjudication by the Commissioner of the General Land Office, when that officer expressly declines to pass upon the question, and expressly provides that mineral land shall not be affected. He claims that, although Congress did not intend to grant mineral land and did not grant it, and although the Commissioner of the General Land Office required that it should be expressly reserved in the certificate of approval of the survey, and although it was expressly reserved in the certificate, he owns it nevertheless, because he succeeded in having it included within the surveyed boundaries of the lands he selected.

It is conceded by counsel for plaintiff in error that the approval by the Commissioner of the General Land Office, either express or implied, is essential to make the selection under this act complete, and it is argued that, as the Commissioner of the General Land Office acknowledged the receipt of the survey, with the approval of the surveyor-general indorsed thereon, on May 4, 1864, and took no formal action by way of disapproval, his approval of the action of the surveyor-general will be implied.

With reference to this argument it must be remembered that the approval of the surveyor-general in itself included the reservation of mineral land, and if the Commissioner of the General Land Office will be held to have approved the action of the surveyor-general, then such approval must go to the entire certificate. In other words, plaintiff can not contend that inaction on the part of the Commissioner of the General Land Office operated as a passive approval of the certificate in so far as said certificate validated the unauthorized survey, and rejected that portion of the certificate which recited that it was subject to the conditions and provisions of section 6 of the act of Congress approved June 21, 1860; that this certificate approval must stand as a whole or it must fall altogether. With it the mineral land is reserved, even though within the land surveyed; without it, plaintiff has no pretense of any authorized survey or location by the officers of the Government.

VI.

THE BARDEN CASE.

A distinction is sought to be drawn by counsel between land grants made to railroads and the grant under discussion, in respect of the mineral reservation. This question was before Secretary Noble, with reference to this identical section, on a motion for rehearing in the case of Baca float No. 3, and the opinion of that officer is so complete an answer to the contention of counsel that I take the liberty to quote from it at length:

> The evident intention in all these acts was to prevent the title to mineral lands from passing thereunder, and to express that intention the language in the act last mentioned (section 6 of the act of June 21, 1860) is just as clear as that used in the others (acts granting lands to railroads). The language used in the act under consideration should be given the same prohibitive force as is accorded to the other acts above mentioned. If this be true, and I do not think it can be successfully controverted, it follows that the reasoning in the Valentine Case applies with equal force to the case now under consideration and that the rule there laid down should be followed here. (13 L. D., 624.)

The Valentine Case referred to is the case of the *Central Pacific Railroad Company* v. *Valentine* (11 L. D., 238), in which case the Secretary had under consideration the grant to the Central Pacific Railroad Company, and the language excepting mineral land from the operation of the act is substantially the same as that construed in the Barden Case.

It is conceded by the Government that there must be some point of time when the character of the land must be finally and officially determined, and when the title shall be deemed, in the absence of fraud, to have passed from the Government under this act. The contention of the United States is that the title could not pass until the selection of the land, its survey, and all proceedings appertaining to the matter had been passed upon and approved, and the nonmineral character of the land determined by the Interior Department, and a patent issued, carrying the whole into effect.

The act of Congress which is the basis of plaintiff's title is in harmony with the provisions of section 453 of the Revised Statutes, which reads:

> The Commissioner of the General Land Office shall perform, under the direction of the Secretary of the Interior, all executive duties appertaining to the surveying and sale of the public lands, or in any wise appertaining to such public lands, and also such as relate to private claims of land, and the issuing of patents for all grants of land under the authority of the Government."

This provision contemplated that in all cases, unless there were express provisions to the contrary, grants of land should be carried into effect by the Interior Department by the issue of a patent for the conveyance of the title.

There can be but one alternative of the contention just stated, which is that the title rests wholly upon the act of Congress, the selection by the Baca heirs and the Sheldon survey.

That is to say, if no patent was required to pass the final title, it was because the act of Congress was self-executing and intended to be the only evidence of title given to the Bacas, and that the survey was only required to identify on the ground the particular tract of land to which the act of Congress, as a conveyance, was applicable. The act of Congress, standing alone and construed literally, gave the Commissioner of the General Land Office and the Secretary of the Interior no authority in the matter whatever. If these officers had any authority in the premises, it must have been derived from the provisions of section 453 of the Revised Statutes. If that section was not applicable to the particular case, then they had no jurisdiction of any part of the proceedings; if it was applicable, then they had complete jurisdiction of the entire proceedings and a patent was necessary to complete those proceedings.

So, therefore, the title must depend either on the act of Congress and the survey, or it must depend upon a atent issued under the authority of section 453.

The act of Congress and the survey do not carry the mineral land.

The act of Congress expressly reserved the mineral, and the statement of that fact ought to be sufficient to determine the whole case. The *fact* being that the land is mineral land, no person ever got a deed of it from the Government. Now, a *fact* is from everlasting to everlasting. In this case it is as old as the eternal hills and as rock-ribbed as the mountains. It was the same fact when this act of Congress was passed that it is to-day.

The Sheldon survey could not convey the mineral land. The Sheldon survey can not be held to be of the nature of a determination that none of the land within the lines he ran were mineral lands, and this for two reasons—he was not authorized to make any such determination, and he did not pretend to make such determination.

If the court will examine the field notes and plat of that survey copied in the record it will see that the mountains in which are the mineral lands are in the east portion of the tract. It will further see that the east line of the survey was only run 3 miles to the north from the southeast corner, and was abandoned when the mountains were reached. At this point the surveyor makes the following notes:

> From this point to the northeast corner of the grant the mountains are very rugged, precipitous, and deeply covered with snow. The line, if at all, could be carried through only with great difficulty and with a result, with respect to accuracy, which could serve but little to any practicable purpose. I therefore deem it advisable, as, indeed, it seems compulsory, to abandon the line at this point.

The surveyor then proceeds to close up his report of the survey with what he terms a "general description," and the concluding sentence of that description is:

> I saw no indications of the precious metals or metals of any kind, unless the presence of iron may be inferred from the fluctuations of the needle, set forth in the notes.

That is all he had to say as to mineral lands.

It is proper to suggest that this was a survey that did not survey. *Nine miles* of the only part of the line which might be supposed to pass over mineral land was not run. So far as shown, the surveyor did not go over a foot of that part of the tract. It was deeply covered with snow, so he could not have seen mineral if it had been exposed on the surface of the ground.

The only "finding of fact" or "determination" respecting the mineral or nonmineral character of the land, either which he did survey or which he did not survey, is contained in the expression, "I saw no indications of mineral." He does not make of himself a competent witness. He fails to show that he knew anything about the matter. His statement, if taken as evidence under oath, would not be considered by any court as sufficient to sustain a finding that the land was nonmineral. As a judge of the question, he had no evidence before him on which he could act, and he did not act.

Especially is this true in view of the fact, as stated by Justice Smith in the Winscott Case, *supra*, that the surveyor "is not directed to search for mines, but merely to report such as come to his knowledge while passing along the outlines" of the land he is surveying, and that "the law nowhere says that the report thus made is to be conclusive even of matters of fact reported, and it certainly would be contrary to all rules of sound reason to hold that such a report is to be conclusive, or even presumptive negatively, that is, of matters not reported."

VII.

WAS THE LETTER OF COMMISSIONER WILLIAMSON IN 1879 AN ADJUDICATION AS TO THE CHARACTER OF THIS LAND?

This letter purports to be a decision of the Commissioner of the General Land Office upon the application of Hon. William Gilpin for a patent to the tract of land known as Baca Claim No. 4, and in so far as it is decisive of the question of issuing a patent, it is entitled to great, if not controlling, weight.

The status of this claim at this time was as follows: The act of Congress was passed in 1860. In 1863 selection and the Sheldon survey was made, and in 1864 the survey was approved, subject to the conditions and provisions of the act. It will be noted that in all these proceedings the Commissioner of the General Land Office carefully avoided any decision as to the mineral character of the land and had expressly required that the surveyor-general should do likewise. Hence the desire of Governor Gilpin for some action on the part of the Government which would operate as an adjudication of this question was very natural, and the application for patent was evidently the outcome of this desire.

This being the status of affairs, if the Commissioner had granted the application and had recommended that patent issue, and such recommendation had been carried out, this would, under all the authorities, have operated as an official adjudication that the land was of the character which passed by the grant. But such was not the

decision of the Commissioner. On the contrary, *he refused a patent*, and, so far as the *record* discloses, this matter stands thus: The claimant made application to the Commissioner for a patent, that patent was refused, and this is all there is to the adjudication.

By an adjudication the Government is bound, *but the reasons given by the Commissioner* for an adjudication should be given such weight only as their own reasoning entitles them to. As such reasoning is contrary to the settled practice of the Department and contrary to the repeated decisions of this court, it seems to us that its length and the space which it occupies in the brief of counsel are its principal recommendations to notice. It seems hardly necessary to cite authorities upon the proposition that this court is not bound by the decision of any officer of the Land Department upon a question of law, but the opinion of Mr. Justice Daniels, in the case of *Irvin* v. *Marshall* (20 How., 567), states this proposition so succinctly that it may not be out of place to quote a portion of that opinion:

> It has been argued that it is the practice of the officers of the Land Office to receive the certificate of purchase as presenting upon its face the only evidence of title, and that those officers will recognize no other evidence of title but this certificate. Of the practice or the opinion of the officers of the Land Department no evidence is exhibited upon this record. But, supposing these to be in accordance with the above suggestion, they could by no means control the action or the opinion of this court in expounding the law with reference to the rights of parties litigant before them; and this they must

> do, in accordance with their own convictions, uninfluenced by the opinions of any and every other department of the Government.

What has been said with reference to the letter of Commissioner Williamson applies with equal force to the subsequent letters of Commissioner McFarland and Acting Commissioner Stone, which are founded upon and are mere repetitions of Williamson's letter.

It may not be out of place to review some of the authorities cited by counsel for plaintiff in error.

In the case of *Stark* v. *Starrs* (6 Wall., 418), the court had under consideration the donation act of Oregon, as it is called, in the fourth section of the act of Congress, approved September 27, 1850 (9 Stat. L., 497), and the language of the act is, "*there shall be, and hereby is, granted* to every white settler," etc. In the course of the opinion the court says:

> The right to a patent, when once vested, is treated by the Government, when dealing with the public lands, as equivalent to a patent issued. When, in fact, the patent does issue it relates back to the inception of the right of the patentee, so far as it may be necessary to cut off intervening claimants.

Applying this proposition, which is quoted at length in the brief of counsel, to the case at bar, it is proper to inquire what is necessary in order that the "right to a patent" should have "vested" in the heirs of Baca or their representatives. It was necessary that these heirs should have selected *vacant nonmineral* land within three

years from the date of the act of Congress, and that the same should have been surveyed and located. One of the facts necessary before the right to a patent vests is that the land is nonmineral, the very question here under discussion. The right to a patent to mineral land never has vested in the heirs of Baca or their representatives, and, as it never has vested, the Government is under no obligation and the officers of the Government have no right to deal with these lands as though a patent had issued.

It is true that a patent, when issued, relates back to the inception of the right of the patentee, so far as it may be necessary to cut off intervening claimants, but this relation operates only upon such lands as were the *subject of the grant*, and does not operate to cut off intervening investigation by the Government in order to see whether the lands in dispute were or were not of the character covered by the grant.

In the case of *Davis, administrator, against Wiebold* (139 U. S., 507), the contest was between a *patentee* under the town-site law and one claiming under a *subsequent patent* under the mining laws of the United States, and the question at issue was thus stated by Mr. Justice Field, who delivered the opinion:

> When the entry of the town site was had, *and the patent issued*, and the sale made to the defendant of the lots held by him, it was not known—at least it does not appear that it was known—that there were any valuable mineral lands within the town site, and the important question is whether in the absence of this knowledge the defendant can be deprived under

> the laws of the United States of the premises purchased and occupied by him because of a subsequent discovery of minerals in them and the issue of a patent to the discoverer.

This extract from the opinion shows how foreign discussion of that case is to any question involved in this.

In the case of *Defferback* v. *Hawke* (115 U. S., 392), the same judge, in discussing a similar question, uses language showing that the date of the patent is the date at which the right to mineral lands not known to be mineral accrues to the settler. In this case the mining claim was located and the land bought before the town site was located or applied for, and in discussing the question the court uses the following language:

> It is quite possible that lands settled upon as suitable only for agricultural purposes, entered by the settler and *patented by the Government* under the preemption laws, may be found, years *after the patent has been issued*, to contain valuable minerals. Indeed this has often happened. We therefore use the term *known* to be valuable at the time of sale to prevent any doubt being cast upon titles to lands afterwards found to be different in their mineral character from what was supposed when the entry of them was made *and the patent issued*.

In the case of *Ryan against Carter* the statute, instead of being "quite similar" to the one now under discussion, uses this language:

> That the rights, titles, and claims *shall be, and the same are hereby, confirmed to* the inhabitants of the respective towns or villages, etc.

In the case of *Menard against Massey* (8 How., 293), the only question was as to the boundaries of the grant,

and the only matter as to which the United States was held to be concluded was that properly within the powers of the surveyor, namely, the fixing of the boundary lines. This was purely a ministerial act, and involved no decision or adjudication as to the character of the land, nor did it involve the exercise of any judicial or quasi-judicial function.

This is also true of the cases of Cousin against Bane, executor (19 How., 202; Frazier against O'Connor (115 U. S., 102); McCreery against Haskell (119 U. S., 327), and Tubbs against Wilhoit (138 U. S., 134).

In the case of *Langdeau* v. *Hanes* (21 Wall., 521), the granting act was in the usual form, showing an intention that it should execute itself, the words used being "*be, and the same are hereby, confirmed.*"

In the case of *Ryan against Forsythe* (19 How., 334), the General Land Office had recognized and approved the survey by the issuance of a patent.

The citation of counsel from the case of *Stark against Starr* (6 Wall., 413) would have been of more assistance to the court had he extended it a few lines. Counsel quotes as follows:

> The right became perfected when the certificate of the surveyor-general and accompanying proofs were received by the Commissioner of the General Land Office *and he found no valid objection to them.*

If counsel had taken time to read a little further, it would have been found that the court proceeded to make this statement plain by the use of this language:

> That is to say, if the donation act of 1850 was applicable to the lands, his right to a patent became

> perfect when the certificate of the surveyor and accompanying proof showed, in the judgment of the Commissioner, a compliance with its requirements. *That they were satisfactory to his judgment in this respect follows from the subsequent issuance by him of the patent.*

It seems impossible to distinguish this case in such a manner as to prevent the application of the principle announced in the case of *Barden* v. *N. P. R. R.* (154 U. S., 288), cited and quoted from at length in briefs of both the original parties to this case.

If it be conceded that the act of Congress, the selection, and the survey vested in the heirs of Baca only an equitable title, as was held in the case of *Carter* v. *Ruddy* (*supra*), then this case is much stronger than the Barden Case, and calls much more plainly for the application of the principle invoked there, while if it shall be held that the act operated as a grant *in praesenti*, this case is still clearly within the rule there decided.

In this action of ejectment it hardly seems necessary to reply to the appeal to the equity side of this court with which the brief for plaintiff in error concludes. It is well understood that this is strictly a legal action; that when the Baca heirs accepted the grant of 1860, with the reservations, they took the same *cum onere*, and that they must bear the burden of the reservation unless that incumbrance has been removed.

It may not be out of place, however, to call attention to the fact that this was an exchange of property, acre for acre; that the right of Baca to his original grant was subject to this same burden or reservation, and that under

the terms of his original grant there were no means by which the incumbrance or reservation could be removed, and that had he taken his original grant *in place*, and had there been no change of sovereignty, all minerals were *perpetually* reserved to the Government. (Rockwell's Spanish and Mexican Law, p. 49, secs. 1, 2, and 3; ibid., p. 112; 113, and 114.)

This, of course, was a matter for consideration of Congress, and but brings us back to the true rule in the case, that plaintiff must recover upon the act of that body and steps taken under it.

A fair résumé of these proceedings, in so far as they have not been formally disapproved, is as follows:

Congress in 1860 gave to the heirs of Baca a right to select certain vacant lands not mineral.

In 1863 these heirs exercised their right of selection.

In same year the claimants caused a private survey to be made of the lands selected.

In 1864 the surveyor-general was authorized to approve such private survey upon condition that he should include in his certificate the reservations included in the act. In the same year, in compliance with this authority, he does approve this survey, and in his certificate recites that the approval "is subject to the conditions and provisions of section 6 of the act of Congress approved June 21, 1860."

In other words, Congress did not intend to grant mineral land and did not grant it; the Commissioner did not intend that any mineral land should pass by any act of his Department, nor did it pass; the surveyor-general,

by his certificate of approval, expressly reserved mineral lands, and yet, in face of the expressed intention of Congress and of every officer of the Government who ever had anything to do with this grant, it is claimed that land, admitted and known to be mineral for more than twenty years, passed by the grant.

We respectfully submit that the judgment of the circuit court should be affirmed.

JOHN K. RICHARDS,
Solicitor-General.

L. F. PARKER,
Of Counsel for the United States.